

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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|--|---|------------|
| In the Matter of |) | |
| |) | |
| Bright House Networks, LLC |) | |
| |) | CSR 6546-E |
| Petition for Determination of Effective |) | |
| Competition in Winter Haven, Florida (CUID |) | |
| FL0154) |) | |

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2007

Released: March 5, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Bright House Networks, LLC ("Bright House") has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in Winter Haven, Florida (the "City").¹ Bright House alleges that its cable system serving the City is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act")² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and DISH Network ("DISH"). The City of Winter Haven filed an opposition, to which Bright House replied.³

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the record in this proceeding, Bright House has met this burden.

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2).

²See 47 U.S.C. § 543(a)(1).

³Bright House objects to Winter Haven's opposition because it was filed late. According to Bright House's reply, the City filed a Motion for Extension of Time two days before the opposition was due and did not obtain Bright House's consent. In addition, Bright House alleges that there is no indication that the Motion for Extension of Time was timely received by the Commission staff or in fact granted. Nevertheless, we will accept the City's opposition because of the ramifications of granting Bright House's petition.

⁴47 C.F.R. § 76.906.

⁵47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁷ Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ Although Bright House has not provided evidence of the advertising of DBS service in the news media serving the community, it argues that potential subscribers are aware of DBS because of prior Commission findings regarding the ubiquitous availability of DBS service; DBS providers' extensive national, regional, and local advertising; and marketing efforts through television, radio, internet, print media, and direct marketing.⁹ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.¹⁰ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the community are DBS subscribers, we conclude that the population of the community at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹¹ We find further that Bright House has demonstrated that the community is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Bright House sought to determine the competing provider penetration of its franchise area by purchasing a report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to DBS providers within the Community on a five-digit zip code basis.¹² Bright House sought to determine the zip codes that encompassed the franchise area in whole or in part by obtaining data from Media Business Corp., formerly SkyTRENDS.¹³ Bright House derived the DBS subscribership based on an allocation methodology previously approved by the Commission.¹⁴

⁷47 U.S.C. § 543(1)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁸See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹See Petition at 4-5.

¹⁰*Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹¹See 47 C.F.R. § 76.905(g). See also Petition at 5-6.

¹²Petition Exhibit D.

¹³*Id.* at 9 and Exhibit B.

¹⁴*Id.* at 8-9 and Exhibit E. see, e.g., *In re Petition for Determination of Effective Competition in San Luis Obispo City, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002); *CSC Holdings, Inc.*, 19 FCC Rcd 6891 (2004).

5. In opposition, Winter Haven alleges that Bright House has not met its burden of proving that 15 percent of the City's households subscribe to DBS service. Winter Haven argues that Bright House has overstated the number of DBS subscribers because it fails to take into consideration any reduction in SBCA's numbers for courtesy or complimentary accounts and the substantial number of multiple dwelling units ("MDU") households that cannot subscribe to DBS service.¹⁵ The City asserts that 27.37 percent of the City's households live in MDUs.¹⁶ The City identifies 1,990 MDUs where residents cannot obtain DBS service.¹⁷ According to the City, the Commission has recognized that MDUs are an impediment to the households taking DBS service and, given the large MDU presence in Winter Haven, Bright House cannot demonstrate effective competition.¹⁸ In addition, if Bright House were allowed to raise its rates, the City argues that there would be no competitive alternative for the residents.¹⁹ The City also believes that given the large number of MDUs in the City, households with DBS service also subscribe to Bright House's cable service.²⁰ Therefore, Bright House should be required to reduce the number of estimated DBS subscribers by 27.37 percent, which would result in DBS penetration falling below 15 percent.²¹ The City also alleges that potential subscribers are not reasonably aware of the availability of DBS service and Bright House has not provided any evidence of advertisements.²² Finally, the City argues that Bright House's data is dated because it was reported prior to three hurricanes striking the City, which resulted in damage to DBS equipment and caused the cancellation of DBS service.²³ Consequently, Bright House should be required to update the data.

6. In reply, Bright House argues that the City has failed to rebut the *prima facie* showing of effective competition. Bright rejects the City's claim that the DBS subscribership data is stale, and in fact, has supplemented it with a new report from SBCA reflecting data through February 28, 2005.²⁴ According to Bright House, the new data indicates that the number of DBS subscribers has actually gone up by 282 since the previous data was obtained in April 2004.²⁵ The new data reflects an increase in DBS subscribership to 19.14 percent of the households in the City.²⁶ Thus, Bright House asserts, the 2004 hurricanes did not depress DBS penetration. Bright House also rejects the City's argument that the numbers of MDUs undermine the penetration rate of DBS providers.²⁷ Bright House notes that the Media Bureau has already rejected this same line of argument and specifically rejected the presumption that MDU households are unable to take DBS service due to unspecified landlord restrictions or physical barriers to receipt of service.²⁸ Bright House argues that the City's argument should be rejected because the City has failed to provide any specific facts regarding restrictions or resident's actual difficulty in

¹⁵Opposition at 4.

¹⁶*Id.*

¹⁷*Id.* at 4-5.

¹⁸*Id.* at 5-6.

¹⁹*Id.*

²⁰*Id.* at 7.

²¹*Id.*

²²*Id.* at 8.

²³*Id.* at 8-9.

²⁴Reply at 4 and Exhibit B.

²⁵*Id.*

²⁶*Id.* at 5.

²⁷*Id.* at 6.

²⁸*Id.* at 6-7.

obtaining DBS service, especially since the City acknowledges the Commission's OTARD rules prohibit landlord restrictions on tenant installation of DBS equipment to their units.²⁹ Finally, Bright House argues that residents are reasonably aware of the service of DBS providers as reflected by the 19.65 percent penetration rate, which is consistent with nationwide awareness of DBS offerings.³⁰ In addition, Bright House notes the dozens of Commission cases recognizing the ubiquitous availability of DBS service and asserts that residents of Winter Haven are reasonably aware of the options. Nevertheless, Bright House has supplied recent advertisements of DBS providers from the local paper to address the City's concerns.³¹

7. We find that the City's arguments lack merit. We reject the City's argument that the SBCA Report should have discounted the number of DBS subscribers living in MDUs that may lack exterior windows that face directions suitable for satellite signal reception. This argument misapprehends the second prong of the competing provider test, which directs the Commission to determine whether MVPD(s), other than the largest MVPD, actually provide service to 15 percent or more of the total number of households in the franchise area.³² Thus, the City's suggestion that we use a figure that contains an unspecified discount to reflect multi-unit buildings with signal reception problems is inconsistent with Section 623(l)(1)(B)(ii).³³ With regard to the DBS subscribership data, Bright House provided the City with a copy of the SBCA Report identifying the total number of DBS subscribers located within the franchise area, as well as a copy of the methodology detailing how SBCA reached this result.³⁴ If the City believed that other data would provide more accurate DBS subscriber counts, the burden is on the City to present such evidence for the record. The SBCA Report specifies the methodology used in compiling the DBS subscribership and addresses many of the City's other alleged unsupported assumptions regarding the type of subscribers that are included and excluded to avoid duplication and accurately reflect the individuals subscribing to DBS service within the franchise area for purposes of determining effective competition.³⁵ Accordingly, we will accept the number of Winter Haven DBS subscribers indicated in Bright House's petition.

8. Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,³⁶ we find that Bright House has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the City. Therefore, the second prong of the competing provider test is satisfied as to the City. Based on the foregoing, we conclude that Bright House has submitted sufficient evidence demonstrating that its cable system serving the City is subject to effective competition.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Bright House Networks, LLC **IS GRANTED**.

²⁹*Id.*

³⁰*Id.* at 7-9.

³¹*Id.* and Exhibit D.

³²47 U.S.C. § 543(l)(1)(B)(ii).

³³*Id.*

³⁴Petition Exhibits 4 and 5.

³⁵*Id.*, Exhibit 5.

³⁶*Id.* at 5-8 and Exhibits 4, 5, and 6.

10. **IT IS FURTHER ORDERED** that the certification of the City of Winter Haven, Florida to regulate basic cable service rates **IS REVOKED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁷

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

³⁷47 C.F.R. § 0.283.

CSR 6546-E

COMMUNITY SERVED BY BRIGHT HOUSE NETWORKS, LLC

| Communities | CUIDS | CPR* | 2000 Census Households⁺ | Estimated DBS Subscribers⁺ |
|--------------------|--------------|-------------|---|--|
| Winter Haven | FL0154 | 19.13% | 11833 | 2264 |

*CPR = Percent of competitive DBS penetration rate.

⁺See Bright House Petition at 7-9 and Exhibits A, B, C, D, and E; Reply at 4-5 and Exhibits B and C.